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**In the Supreme Court of the United States**

OCTOBER TERM, 1991

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ROBERT "BOSKO" STRUMINIKOVSKI, PETITIONER

v.

UNITED STATES OF AMERICA

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ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT

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BRIEF FOR THE UNITED STATES IN OPPOSITION

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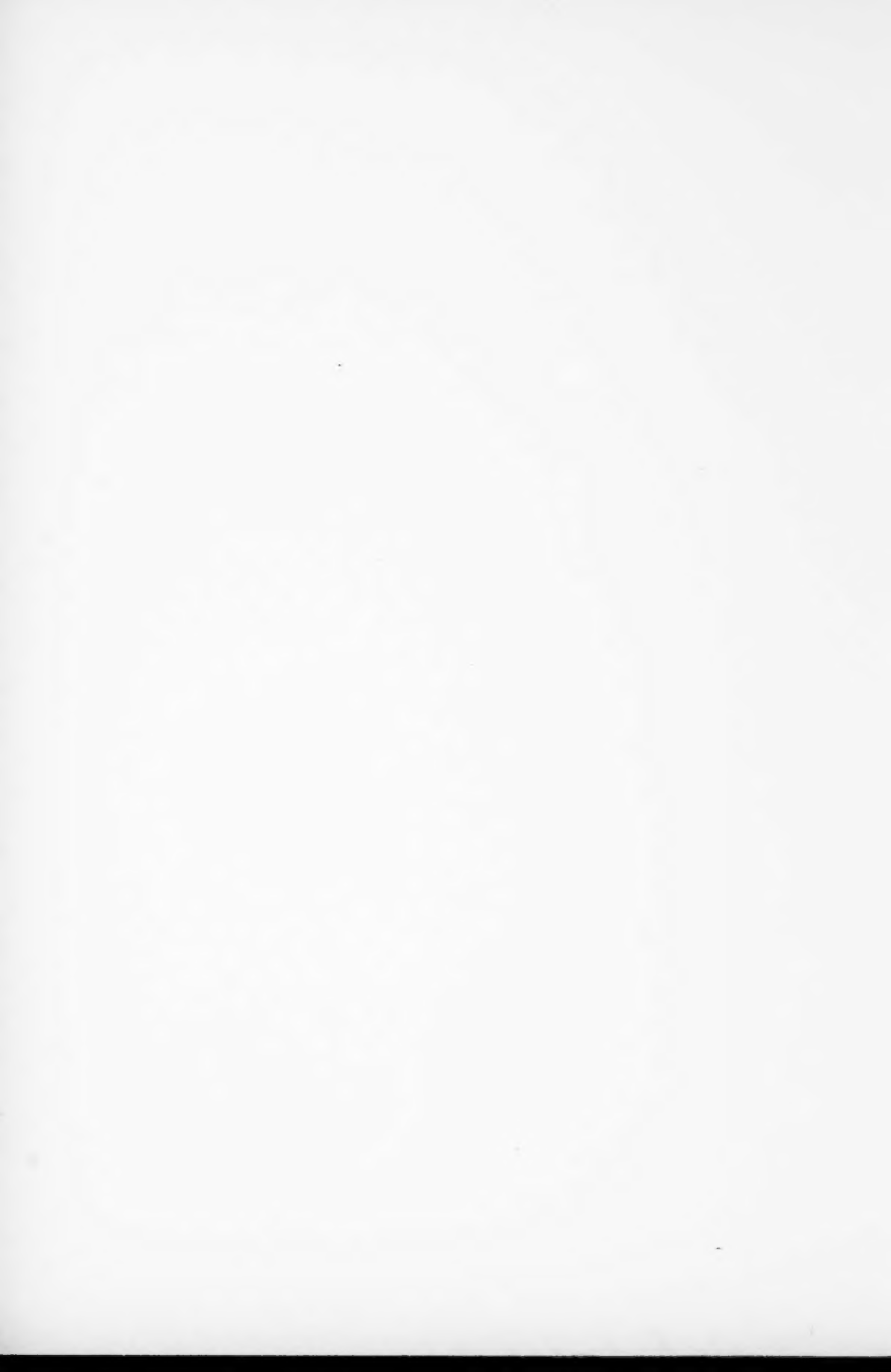
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## QUESTIONS PRESENTED

1. Whether petitioner was deprived of the effective assistance of counsel when, during closing argument, his trial attorney acknowledged the facts underlying the less serious charges while vigorously disputing the more serious charges.

2. Whether, in assessing petitioner's claim of ineffective assistance of counsel, the court of appeals erred in relying on a document that petitioner brought to the court's attention.



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### **OPINION BELOW**

The opinion of the court of appeals (Pet. App. 1a-27a) is reported at 931 F.2d 1186.

### **JURISDICTION**

The judgment of the court of appeals (Pet. App. 28a) was entered on May 3, 1991. A petition for rehearing was denied on June 5, 1991. Pet. App. 29a. The petition for a writ of certiorari was filed on September 3, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### **STATEMENT**

After a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted of engaging in a continuing criminal enterprise, in violation of 21 U.S.C. 848 (Count 1);

conspiring to distribute cocaine and heroin and to possess cocaine and heroin with intent to distribute them, in violation of 21 U.S.C. 846 (Count 2); distributing cocaine, in violation of 21 U.S.C. 841(a)(1) (Counts 3, 5, 6, 7, 8, 9, 11); possessing cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1) (Counts 12 and 14); distributing cocaine to a pregnant woman, in violation of 21 U.S.C. 845b(f) (Count 10); possessing heroin with intent to distribute it, in violation of 21 U.S.C. 841(a)(1) (Count 15); possessing morphine, in violation of 21 U.S.C. 844 (Count 16); offering a bribe to a public official, in violation of 18 U.S.C. 201(b)(1) (Count 13); possessing firearms in connection with drug trafficking crimes, in violation of 18 U.S.C. 924(c) (Count 17); and being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g)(1) (Count 18).<sup>1</sup> He was sentenced to a total of 23 years' imprisonment, to be followed by 38 years' supervised release, and was fined \$140,000. The court of appeals affirmed. Pet. App. 1a-27a.

1. From the summer of 1984 through August 1987, petitioner headed an operation that distributed cocaine and heroin in the Cicero, Illinois, area. Petitioner and his subordinates ran the drug operation out of various restaurants and petitioner's residence. Co-defendant Lubin Milevski supervised the drug

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<sup>1</sup> Petitioner stood trial with co-defendants Dominic Simone, Nicholas Simone, John Peter Suchan, Vasil Struminikovski, Panagiotis "Pete" Pistas, Deborah Cervený, and Lubin Milevski, all of whom were convicted on the conspiracy count and various substantive drug offenses. Pet. App. 2a-3a & nn.1-2. Their convictions were affirmed in the opinion below. Four other co-defendants—Carmella Viola, Brenda Parson, Amanda Roland, and Vito Cancialosi—pleaded guilty and testified for the government at trial. *Id.* at 2a n.1.

operation during the day, and petitioner supervised it at night. The other co-defendants assisted in selling the drugs and acting as lookouts. Pet. App. 2a, 3a-5a; Gov't C.A. Br. 7-9.

Tom Kelly, an agent of the Drug Enforcement Administration working undercover, made several purchases of cocaine from petitioner's operation. In March and April 1986, Agent Kelly bought 45.42 grams and 56.4 grams of cocaine from petitioner. C.A. App. 12, 13. In March 1987, Kelly bought 55 grams of petitioner's cocaine from co-defendant John Suchan. In July and August 1987, Kelly negotiated with petitioner and Suchan for the sale of 2.3 kilograms of petitioner's cocaine. On August 28, 1987, petitioner had the cocaine delivered to Kelly by co-defendant Amanda Roland, who was eight and a half months pregnant at the time. Roland was arrested after delivering the cocaine, and petitioner and Suchan were arrested later that night. At the time of his arrest, petitioner offered a bribe to the arresting officers. A search of petitioner's house yielded quantities of cocaine, heroin, and morphine, as well as guns and cash. Pet. App. 5a-6a; Gov't C.A. Br. 9-10.

2. In his opening statement at petitioner's trial, counsel for petitioner acknowledged that petitioner had done "something wrong," but counsel maintained that petitioner had acted alone, and not in conjunction with others or as the head of a criminal enterprise. Pet. App. 15a. Thereafter, 15 witnesses testified that they had bought cocaine from petitioner or his co-conspirators or had seen petitioner selling cocaine. Gov't C.A. Br. 37 n.20. In his closing argument, petitioner's counsel acknowledged that petitioner had sold drugs, but counsel steadfastly main-

tained that petitioner had done so "by himself." Pet. App. 15a; Gov't C.A. Br. 37 & n.21. Both in his closing argument and during trial, counsel vigorously argued that petitioner was not guilty of the conspiracy or the continuing criminal enterprise charges. Counsel likewise maintained that petitioner was innocent of the other charges that carried enhanced or mandatory minimum penalties. Pet. App. 14a-15a & n.10.

3. On appeal, petitioner retained new counsel and argued that he had been deprived of the effective assistance of counsel at trial. The court of appeals rejected that argument and affirmed petitioner's convictions.<sup>2</sup> The court determined from the trial transcript that in the closing argument petitioner's trial counsel conceded only the facts that had been established by "indisputable evidence and credible testimony." Pet. App. 14a. At the same time, the court found, trial counsel "vigorously contested the most serious charges, such as conspiracy and continuing [criminal] enterprise." *Id.* at 15a. The court concluded that this was a "logical trial strategy" in light of the "overwhelming evidence of drug trafficking \* \* \* introduced at trial." *Ibid.* The court also determined that petitioner had concurred in that strategy. *Id.* at 16a-18a. The court observed that the strategy was "evident from the beginning of the trial" and "[a]t no time did [petitioner] object to it." *Id.* at 18a. The court also relied on a post-trial letter from petitioner to the trial judge, which petitioner cited in his brief to the court of appeals. *Id.* at 16a & n.11. The court determined that the letter

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<sup>2</sup> In addition to his claim of ineffective assistance of counsel, petitioner advanced other arguments that the court of appeals considered and rejected. Pet. App. 2a, 6a-11a, 19a-22a. Petitioner does not renew those arguments in this Court.

“made clear” that the tactics employed by petitioner’s counsel at trial “followed [petitioner’s] approach by denying the conspiracy while conceding [petitioner’s] own undeniable drug transactions.” *Id.* at 16a.<sup>3</sup>

### ARGUMENT

1. Petitioner contends (Pet. 5-21) that he was deprived of the effective assistance of counsel by his trial counsel’s decision in closing argument to acknowledge the factual elements of certain charges. The court of appeals correctly rejected that contention, and its decision does not conflict with any decisions of this Court or other courts of appeals.

To establish a claim of ineffective assistance of counsel, a criminal defendant must show both that his counsel’s performance was deficient and that the deficiency prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To make the first showing, the defendant must overcome a strong presumption that counsel rendered adequate assistance by demonstrating that counsel’s representation fell outside the “wide range of professionally competent assistance.” *Id.* at 690. Moreover, “[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding” unless “there is a reasonable probability that, but for counsel’s unprofessional errors, the re-

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<sup>3</sup> Having concluded that petitioner had not met his burden of proving that his trial counsel’s performance was deficient, the court found it unnecessary to consider whether the asserted deficiencies caused petitioner prejudice. Pet. App. 19a n.16 (citing *Strickland v. Washington*, 466 U.S. 668 (1984)). The court noted, however, that petitioner “did not argue that the jury’s decision would probably have been different absent his counsel’s alleged errors.” Pet. App. 19a n.16.

sult of the proceeding would have been different.” *Id.* at 691, 694. Thus, “[f]ailure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim.” *Id.* at 700.

Petitioner did not argue below, and does not argue in this Court, that his trial counsel’s strategy prejudiced his defense. Pet. App. 19a n.16. Under *Strickland* it is clear that petitioner’s failure to do so, standing alone, is fatal to his claim of ineffective assistance of counsel. See 466 U.S. at 696 (“a court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors”).<sup>4</sup>

In any event, the court of appeals correctly concluded that petitioner also “failed to show that the conduct of his trial counsel \* \* \* fell below an objective standard of reasonableness.” 931 F.2d at 1197.<sup>5</sup> As the court below explained, because the evidence of petitioner’s drug trafficking was “overwhelming,” it would have been “foolhardy for [petitioner’s] counsel to deny the drug sales so credibly proven by the government.” Pet. App. 15a, 18a. In the face of that evidence, it was not unreasonable for counsel to acknowledge that the drug sales occurred. As the courts have recognized, a defense counsel may reason-

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<sup>4</sup> In *Strickland*, 466 U.S. at 692, the Court indicated that prejudice may be presumed with regard to certain categories of claims of ineffective assistance, but petitioner’s claim does not fall into any of those categories. See also *United States v. Cronin*, 466 U.S. 648, 658-662 (1984).

<sup>5</sup> The reported version of the decision below is cited in the text because the reported version corrects an apparent grammatical error in the slip opinion. See Pet. App. 19a.

ably conclude that such an approach is the only way of preserving credibility before the jury. *Messer v. Kemp*, 760 F.2d 1080, 1090 (11th Cir. 1985), cert. denied, 474 U.S. 1088 (1986); see also *United States v. Leifried*, 732 F.2d 388, 390 (4th Cir. 1984) (decision of defense counsel to “admit guilt on individual drug trafficking offenses where the evidence of guilt was overwhelming and attempt to persuade the jury of [the defendant’s] innocence of the continuing criminal enterprise charge was acceptable trial strategy”). Petitioner’s counsel reasonably could conclude that, by preserving his credibility with respect to the lesser charges, he had a better chance of obtaining an acquittal on the more serious charges.

Petitioner argues (Pet. 8-11) that his trial counsel’s strategy was impermissible under this Court’s decisions in *Brookhart v. Janis*, 384 U.S. 1 (1966), and *United States v. Cronin*, 466 U.S. 648 (1984). Petitioner’s reliance on those decisions is misplaced.

In *Brookhart*, the defense counsel consented to a summary trial procedure in which the prosecutor made only a *prima facie* showing of guilt and the defense was not permitted to offer any evidence or cross-examine any witnesses. 384 U.S. at 2-3. The defendant, however, asserted on the record that he wanted to “have a trial in which he [could] confront and cross-examine the witnesses against him.” *Id.* at 7. The Court in *Brookhart* held that the defendant’s attorney could not override the defendant’s expressed desire to exercise his right to confront and cross-examine the witnesses against him. *Id.* at 7-8.

The holding in *Brookhart* clearly does not apply here. In *Brookhart*, the defendant’s lawyer did not put on any defense. The practical effect was that counsel “overr[o]de his client’s desire expressed in

open court to plead not guilty.” *Brookhart*, 384 U.S. at 7-8. Here, in contrast, defense counsel put the government to its proof on all counts. Then, faced with overwhelming evidence of certain lesser charges, counsel reasonably decided to contest only the most serious charges. See Pet. App. 15a-16a, 18a. As the court of appeals observed, that tactic was part of a “reasonable plan that was evident from the beginning of the trial.” *Id.* at 18a. No similar tactical considerations could explain the complete abdication of a defense at issue in *Brookhart*. Moreover, in contrast to the record in *Brookhart*, the record in this case indicates that petitioner concurred in his trial counsel’s strategy. Pet. App. 16a-18a. *Brookhart* is thus inapposite.

Petitioner also relies (Pet. 9) on the Court’s statement in *United States v. Cronin*, 466 U.S. at 656-657 n.19, that “when no theory of defense is available, if the decision to stand trial has been made, counsel must hold the prosecution to its heavy burden of proof beyond reasonable doubt.” The Court in *Cronin* went on, however, to state that “[i]f there is no bona fide defense to the charge, counsel cannot create one and may disserve the interests of his client by attempting a useless charade.” *Ibid.* That observation fully applies here. As the court of appeals recognized, petitioner’s trial counsel could only have disserved petitioner’s interests by “deny[ing] the drug sales so credibly proven by the government.” Pet. App. 18a. Thus, nothing in *Cronin* precludes the tactical decision that counsel for petitioner made here.

Petitioner’s reliance on lower court decisions is likewise misplaced. In both of the decisions on which petitioner principally relies (Pet. 13, 16-17), the defense counsel admitted in closing argument that the defendant was guilty on *all* of the charges against

him and argued only for leniency. *Francis v. Spraggins*, 720 F.2d 1190, 1193-1195 (11th Cir. 1983), cert. denied, 470 U.S. 1059 (1985); *Wiley v. Sowers*, 647 F.2d 642, 648-651 (6th Cir.), cert. denied, 454 U.S. 1091 (1981). Thus, *Spraggins* and *Wiley*, like *Brookhart*, involved complete surrenders of a defense; like *Brookhart*, they are inapposite for that reason. As the Sixth Circuit observed in *Wiley*, there is a difference between a "tactical retreat" and a complete "surrender of the sword." 647 F.2d at 649. The Eleventh Circuit similarly emphasized in a decision subsequent to *Spraggins* that "it is a 'complete concession of the defendant's guilt' which constitutes ineffective assistance." *Messer*, 760 F.2d at 1090 n.6 (quoting, with emphasis, *Spraggins*, 720 F.2d at 1194).<sup>6</sup> Here, "rather than concede guilt completely, [petitioner's counsel] competently challenged the prosecution's proof" on the most serious charges. Pet. App. 18a.

*Spraggins* and *Wiley* are inapposite for another reason. There was no evidence in either case that the defendant consented to his trial counsel's concessions. *Spraggins*, 720 F.2d at 1193 (counsel's concession of guilt conflicted with defendant's testimony denying involvement in the offense charged); *Wiley*, 647 F.2d at 650 (concessions were made without defendant's consent). Here, in contrast, the court of appeals determined that petitioner's counsel "was following his client's wishes." Pet. App. 17a. Petitioner challenges that determination on the ground

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<sup>6</sup> See also *McNeal v. Wainwright*, 722 F.2d 674, 675-676 (1984), in which the Eleventh Circuit held that defense counsel's decision to concede that his client committed manslaughter, but not first degree murder, did not deprive the defendant of the effective assistance of counsel.

that his consent was not obtained on the record and after judicial inquiry to ensure that the consent was knowing and voluntary. Pet. 9-11. None of the case law on which petitioner relies, however, supports imposing such a procedure in this context. While the court in *Wiley* indicated that such a procedure should be followed when defense counsel completely concedes his client's guilt to the charges, 647 F.2d at 650, the court did not suggest that the same requirement should apply when, as in this case, the defendant's attorney concedes some of the lesser charges in the reasonable belief that doing so maximizes the chance of proving innocence as to the more serious charges.<sup>7</sup>

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<sup>7</sup> Like *Wiley* and *Spraggins*, *Lobosco v. Thomas*, 928 F.2d 1054, 1056 (11th Cir. 1991), involved a complete concession by defense counsel that defendant was guilty as charged in the indictment. Thus, the suggestion in *Lobosco* that the defendant's consent to such a concession should be on the record does not apply here. *Id.* at 1057. In addition, that suggestion was clearly dictum, since the *Lobosco* court determined that consent had been obtained—and accordingly rejected the claim of ineffective assistance of counsel—based on the deposition of the defense counsel. *Ibid.* The other cases on which petitioner relies (Pet. 18-19) are even wider of the mark. In *Mullins v. Evans*, 622 F.2d 504, 506 (10th Cir. 1980), the defendant's lawyer went beyond conceding his client's guilt; he argued that the defendant should be convicted of first degree murder rather than the lesser charges. *Cox v. Hutto*, 589 F.2d 394 (8th Cir. 1979), and *United States v. Brown*, 428 F.2d 1100 (D.C. Cir. 1970), involved stipulations by defense counsel. The stipulations in *Cox* conceded the defendant's guilt as to the most serious charge—that of being a habitual offender—for which, in addition to a two-year sentence for burglary, the defendant received a 31-year sentence. 589 F.2d at 395-397. The stipulations in *United States v. Brown* admitted that the defendant committed all of the acts charged in the indictment. 428 F.2d at 1101-1102.

2. Petitioner further contends (Pet. 21-27) that, in assessing his claim of ineffective assistance of counsel, the court of appeals improperly engaged in fact-finding by relying on a post-trial letter from petitioner to the trial judge. Petitioner is in no position to raise that contention here, however, because it was petitioner who brought the letter to the court of appeals' attention. Pet. App. 16a n.11, citing Pet. Supp. C.A. Br. 22 n.29. Petitioner cannot have it both ways; having used the letter in an attempt to buttress his claims, petitioner cannot now complain merely because that attempt backfired.

### CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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